IN FACT AND IN LAW

Labour

November 2001

Can a Unionized Employee Go Before the Superior Court to Contest an Arbitration Award If His Union Refuses To Do So?

By Jean Beauregard

Barring exceptional circumstances, such as collusion between the employer and the union or a violation of certain fundamental rules of natural justice, the answer is "no". Such was the ruling of the Supreme Court of Canada in *Noël* v. *S.E.B.J.*

The Facts

Christian Noël was employed by the S.E.B.J. as a flight dispatcher at the Fontagnes airport in James Bay. Following a series of events, the S.E.B.J. terminated his employment. Christian Noël filed eight grievances, one of which was related to his dismissal.

The collective agreement to which he was subject gave the union exclusive authority to represent employees for the purposes of the grievance procedure. Nonetheless, the union and the employer allowed Mr. Noël to apply to the arbitrator directly, although the union retained control over the arbitration procedure and assumed the costs thereof. The arbitrator who heard the case dismissed the eight grievances and upheld the dismissal.

The union decided not to take the matter further despite Mr. Noël's requests to do so.

Mr. Noël then decided to act on his own. He first filed a motion for judicial review before the Superior Court (art. 846 of the Quebec *Code of Civil Procedure*) which was dismissed on the ground that this type of proceeding was available only to the original parties at first instance, namely, the union and the S.E.B.J. Consequently, because Mr. Noël had not been a "party" at first instance, he did not have the requisite legal interest to avail himself of this recourse.

Mr. Noël then tried to use another approach—a direct action in nullity—a recourse that is generally available to any person whose rights have been infringed, irrespective of that person's status as a "party" before the lower court. Using this legal recourse, he sought to have the arbitration award confirming his dismissal set aside by arguing that the arbitrator had exceeded his jurisdiction. However, he used the same arguments and asked for the same conclusions as in his motion for judicial review. Indeed, this second recourse was, for all intents and purposes, a carbon copy of the first.

The Decision of the Lower Courts

Both the Superior Court and the Court of Appeal dismissed Mr. Noël's action on the ground that since this was a direct action in nullity against an arbitration award that was based upon the arbitrator's having exceeded his jurisdiction, the legal interest required in order to bring the action was the same as that required to file a motion for judicial review. Consequently, in such a case, this legal recourse was available only to a person who had been a "party" before the arbitrator.

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BARRISTERS AND SOLICITORS

The Court of Appeal, in a majority judgment written by Madam Justice Mailhot[1], stated that a party's interest to institute proceedings should not be determined on the basis of the form of the written proceedings, but according to the type of relief sought. In the case at bar, the relief sought in both recourses was the same, namely, to have the arbitration award quashed for an excess of jurisdiction.

Madam Justice Mailhot also noted that in matters of collective labour relations, legal representation of the employees is the prerogative of the certified union; consequently, the legal interest required to institute an action in nullity as regards an arbitration award must be the same as that which is required to file a motion for judicial review to have the arbitration award quashed, namely, the person must have been a "party" to the dispute before the arbitrator. Given that Mr. Noël had been represented by his union before the arbitrator, he had not been a "party" to the proceedings.

However, Madam Justice Mailhot left the door open with respect to certain hypothetical cases, such as those in which there is some collusion between the employer and the union or a situation of injustice amounting to fraud.

The Decision of the Supreme Court of Canada

The Supreme Court of Canada, in a judgment written by Mr. Justice LeBel, unanimously dismissed Mr. Noël's appeal. According to Mr. Justice LeBel, the existence of an interest to institute legal proceedings depends on the existence of a substantive right which presupposes an analysis of the right giving rise to the proceedings.

Having carried out such an analysis, Mr. Justice LeBel noted that the action instituted by Mr. Noël did not include any allegation, other than a claim that the arbitration award was unreasonable, in order to support his application to have the award set aside. He also noted that there was no allegation claiming that the union had improperly performed its mandate to represent him, nor was there any allegation of bad faith or of collusion between the employer and the union. Mr. Noël's only complaint against the union was its refusal to institute new proceedings in order to contest the legality of the arbitrator's decision.

Finally, Mr. Justice LeBel noted that the award in question had been rendered in accordance with the provisions of the Quebec *Labour Code* and the collective agreement to which Mr. Noël was subject. It was therefore situated within the broader framework of the entire relationship between the union and the employer in respect of which it was certified and with which it had entered into collective agreements.

According to Mr. Justice LeBel, one of the fundamental principles governing collective labour relations is the monopoly granted to a union as regards representation and the corollary obligation for the union to properly perform its duty of representation, namely, in good faith and without discrimination, arbitrary conduct or serious negligence. Because it has an exclusive representation function, the union erects a screen between the employer and the employees, not only regarding the negotiation of the collective agreement, but also concerning the application thereof. The union's power to control the process includes the power to settle cases or to bring cases to a conclusion during the course of the arbitration process, or to work out a solution with the employer, subject to the obligation to act in good faith.

Having established this principle, Mr. Justice LeBel recognized that the implementation of each decision by a union in processing grievances calls for a flexible analysis which takes a number of factors into account, including the importance of the grievance to the employee, the likelihood that the grievance will succeed, the interests of the bargaining unit as a whole and the competing interests of the other employees. In summary, the union has discretion in making its decision.

[1] As for Mr. Justice Robert, who wrote a dissenting opinion, he would have allowed the appeal and would have recognized Mr. Noël's standing to act on his own. According to Mr. Justice Robert, the party—Mr. Noël—had the choice between two procedural methods in order to assert his rights, which methods are governed by separate procedural rules, including the nature of the requisite interest. Given that Mr. Noël had been adversely affected by the arbitration award, he had the requisite interest to institute a direct action in nullity. To apply the rules regarding the requisite interest for filing a motion for judicial review to a direct action in nullity would unduly limit the superintending and reforming power vested in the Superior Court.

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Mr. Justice LeBel further stated that after an unfavourable arbitration award has been made, the union still has the exclusive right to represent the employees, subject to the same obligation to properly perform its duty to act in good faith and to the same degree of flexibility in exercising its reasonable discretion. A union cannot be placed under a duty to challenge each and every arbitration award at the behest of the employee in question on the ground of unreasonableness of the decision, even in dismissal cases. The employer and the union are entitled to the stability that results from the fact that, in principle, the arbitration award is final and without appeal, and that it binds the parties and, where such is the case, any employee concerned (section 101 of the Quebec *Labour Code*).

While judicial review by the superior courts is an important principle, it cannot allow employees to jeopardize the expectation of stability in labour relations in a situation where there is union representation. To do so would defeat the union's exclusive right of representation and the legislative intent regarding the finality of the arbitration process, and would seriously jeopardize the effectiveness and speed of the arbitration process.

Conclusion

Even in matters of dismissal, a unionized employee does not have the requisite standing to go before the Superior Court to challenge an arbitration award that he considers unreasonable, on the sole ground that his union refuses to initiate the necessary proceedings. Such a right would negate the exclusive nature of the union's representation mandate in matters that are central to its function and to the reasonable leeway it is afforded under its duty of representation. This principle is applicable regardless of the procedural method adopted.

Nonetheless, the Supreme Court recognized that this is not an absolute principle and that there might be circumstances in which a unionized employee would have the legal interest to institute proceedings on his own. This would be the case if there were collusion between the employer and the union, or fraud or bad faith on the union's part. It would also be the case in certain situations where there has been a violation of the *audi alteram partem* rule or if the arbitration tribunal has been constituted in breach of the law.

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